
IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6909

Supreme Court, U. S.

FILED

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GARY MANESS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender
Rehabilitation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

ALBERT G. CARUANA
Cooperating Attorney
American Civil Liberties Union
Miami Chapter
c/o Greenberg, Traurig, Hoffman,
Lipoff, Quentel & Wright, P.A.
1401 Brickell Avenue
Miami, Florida 33131

Counsel for Petitioner

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
800 Metro Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

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OPINION BELOW

The opinion of the United States Court of Appeals
for the Fifth Circuit is reported at 512 F.2d 88. (A.
226)

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on April 15, 1975. A suggestion for rehearing en banc was timely filed, (A. 232) and was granted on September 2, 1975. (A. 243) On March 18, 1976, the court of appeals, sitting en banc, voted 10:5 to vacate its order granting rehearing en banc. 512 F.2d 1381 (A. 244)

A petition for writ of certiorari was timely filed within ninety days of the disposition of the suggestion for rehearing en banc, invoking this Court's jurisdiction under 28 U.S.C. §1254(1). Certiorari was granted on October 18, 1976.

QUESTION PRESENTED

WHETHER THE COURT BELOW ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF A PARTY'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND VIOLATING THE PETITIONER'S RIGHTS TO A FAIR TRIAL, COMPULSORY PROCESS, CONFRONTATION, AND CROSS-EXAMINATION, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

Section 1 of Amendment XIV to the Constitution of the United States provides in pertinent part: "... nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT

A. The Prosecution of the Petitioner in State Court

This case arises from the petitioner's trial on charges that he was criminally responsible for the death of his and his wife, Linda's, infant daughter. The infant, Misty Maness, died in April of 1971, the victim of the "battered child syndrome." The police conducted an investigation of both petitioner and his wife regarding the death of the child.

On June 8, 1971, an information was filed in the Criminal Court of Record, Dade County, Florida, charging the petitioner with manslaughter. Petitioner entered a plea of not guilty, and a jury trial was had on October 4th and 5th, 1971.

During the trial, the petitioner sought to establish that he was innocent of the charge and that there was

reason to believe that his wife, Linda Maness, the only other suspect, had committed the offense.¹

The petitioner testified at the hearing on his motion to suppress that he had made an inculpatory extrajudicial statement to the police to protect his wife, because she had told him that she was pregnant. Petitioner further testified that the statement he had previously given was one which he had agreed upon with his wife prior to their interrogation by the police in order to protect her from arrest and was not, in fact, the true version of what had happened. (A. 14-15, 108-109, 117)

The state did not charge Linda with responsibility for the infant's death. The state had listed Linda on its witness list, (A. 21-22) and subpoenaed her from Texas to appear at the petitioner's trial. (A. 17) The prosecution did not, however, call Linda as a witness in its case in chief. Petitioner's trial counsel was thus forced to call Linda as a witness, and immediately asked the court to declare the witness an adverse and hostile witness so that she could be cross-examined. (A. 85) The court repeatedly refused to permit the defense to treat Linda as an adverse and hostile witness. Linda testified consistently with the state's position. Defense counsel's attempts to impeach her testimony, in which she, *inter alia*, denied striking the baby, were prohibited by the state trial court on the grounds that the

¹ Petitioner's trial counsel made a five sentence opening statement to the jury, in which he said that the petitioner had made a statement to the police, but that he would show that the statement was untrue. He also stated: "[W]e will show who, in fact, probably did kill the child." (A. 25) Immediately prior to the commencement of the trial, defense counsel had characterized Linda Maness as the "defendant's chief witness." (A. 17)

petitioner would not be permitted to impeach his own witness.² (A. 85-97; 100)

LINDA MANESS was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q BY MR. MINKUS: Did you ever tell —

THE COURT: May we have her name and address —

MR. McWILLIAMS: Objection.

THE COURT: — on the record?

Q (By Mr. Minkus) What is your name and address, for the record?

A Mrs. Gary Maness, 225 Harvard Avenue, El Paso, Texas.

MR. MINKUS: At the particular time, Judge, I would like to question the witness as an adversary and hostile witness.

THE COURT: Denied. There's no showing.

Q (By Mr. Minkus) Did you ever have a conversation —

MR. McWILLIAMS: Objection.

THE COURT: Sustained.

Q (By Mr. Minkus) Did you ever tell Mrs. McClain —

MR. McWILLIAMS: Objection

THE COURT: Too leading?

MR. McWILLIAMS: No, Judge. He's trying to impeach a witness he hasn't asked any questions on direct yet. It's an improper predicate.

THE COURT: Well, objection sustained to leading.

I don't know. He has not asked the rest of the question. I don't know whether he's impeaching or not.

² The "voucher rule" applied by the Florida court is identical to the rule condemned in *Chambers v. Mississippi*, see n. 5, *infra*.

Q (by Mr. Minkus) *Did you kill your baby?*

A No, I did not.

Q *Did you ever strike your baby -*

A No, I didn't

Q - In the face?

A No.

Q And in the head?

A No.

Q *Isn't it a fact that you know that your husband Gary Maness -*

MR. McWILLIAMS: Objection.

Q (By Mr. Minkus) - *did not -*

MR. McWILLIAMS: Objection, Judge.

THE COURT: Sustained.

MR. McWILLIAMS: Counsel, it's your witness.

MR. MINKUS: Yes, she is an adverse, hostile witness.

MR. McWILLIAMS: Objection to those statements. I move they be stricken. Ask the jury to disregard it.

THE COURT: Objection sustained. Stricken.

(A. 85-86) (emphasis added)

Moreover, the defense was precluded from introducing inculpatory and impeaching letters written by Linda Maness to Gary while he was in jail awaiting trial. (A. 88-92) These letters in effect tended to exculpate Gary Maness in that they stated, *inter alia*, that Gary had not done the act with which he was charged. (A. 89).

Later in the petitioner's trial, the defense counsel called Dana Maness, petitioner's sister-in-law, as a witness. The state objected to her testifying on the grounds that her testimony would tend to impeach Linda, whom the state argued was a defense witness and therefore could not be impeached by the defense pursuant to the voucher rule. This objection was sustained by the trial court. (A. 123-124) Defense counsel then proffered to the court that Dana Maness would testify that, while in Tennessee, Linda had had a

conversation with her in which she told Dana that Gary Maness did not touch the baby and that she did not know what happened, but that Gary Maness did not do what he had been charged with. (A. 123) The proffer of Dana's testimony also included an admission by Linda that she had never left her home on the afternoon the baby was fatally injured. (A. 123) This would have contradicted Linda's in-court testimony (A. 87) and statements to the police, supported petitioner's defense, and corroborated his testimony repudiating his confession. The state trial court ruled that the witness would be precluded from testifying in the manner proffered since this would violate the rule of evidence which prevents a party from impeaching his own witness. (A. 124)

Defense counsel also attempted to call Ruth Maness, the mother of the defendant, but the state objected to her proffered testimony on the grounds that it tended to impeach Linda, a defense witness, and therefore was improper under Florida's voucher rule. The trial court sustained the prosecution's objection. (A. 124) The proffer concerned certain bloody blankets which were found at the Maness residence while Misty was in the hospital. Linda had testified before the jury that the source of this blood was the baby's cracked gum. (A. 95) The proffer of Ruth's testimony was that Linda had told her that the bloody baby blanket was a result of Linda's menstrual period. (A. 124) This testimony, reflecting a prior inconsistent statement by Linda, was excluded by application of the voucher rule. (A. 124)

The petitioner took the stand to testify in his own defense. His testimony directly contradicted Linda's on a number of crucial points.

The petitioner testified that Linda was lying when she stated that she had left the house on the afternoon

the injuries were inflicted. (A. 117)³ The petitioner admitted that he had lied when he had stated to the police that this was the case, but testified that he had done so for the purpose of protecting his wife. (A. 108-109, 114, 117, 120) He had been protecting his wife because she had told him that she was pregnant, and the police had told him that if he did not confess there was a good chance that his wife would go to jail. (A. 108-109, 114, 117, 120)

On cross-examination by the state, Linda had testified that she had seen the petitioner slap the baby in the face on the day in question. (A. 97) The petitioner testified that his wife was lying and that he did not at any time strike the baby in the face. (A. 100, 113, 115)

Linda described an incident in which the petitioner had slapped the baby on the leg, and when Linda had tried to pick up the baby, the petitioner had slapped Linda. (A. 97-98) The petitioner testified that his wife was lying and that it was his wife who had slapped the baby on that occasion. He told her to stop, she said she did not have to, that it was her baby, and the petitioner then slapped his wife. (A. 104-105)

Linda testified that the petitioner had told her that he was not ready to be married and that she should take the baby and go back to her parents. (A. 94, 98) The petitioner testified that he did not feel unduly burdened by the marriage, and that he had not told his wife to leave. (A. 110-111, 115-116) The petitioner testified that it was his wife who had been unhappy and wanted a divorce. (A. 116, 110)

³Based on the voucher rule, the defense had been precluded from establishing that Linda, in her first statement to the police, did not claim that she was out of the house on the afternoon in question. (A. 90-92)

Defense counsel attempted to inquire whether Linda had filed for a divorce against the petitioner. The trial judge sustained the state's objection on relevancy grounds. (A. 93)

With regard to how the baby had sustained its injuries, the petitioner testified that he knew only what his wife had told him in this regard. According to what Linda had told him, and to the best of his knowledge, the baby had fallen down, or gotten caught in its crib, or hit itself in the head with its bottle. (A. 120, 118-119, 115, 103-105)

The defense's case, as limited by the trial court's repeated exclusions of evidence based on the state voucher rule, went to the jury and, on October 5th, 1971, the jury returned a verdict of guilty. The court adjudged the petitioner guilty and sentenced him to be confined in the state penitentiary for a period of twenty years.

B. The Direct Appeal

Petitioner timely appealed from the judgment of conviction and sentence to the District Court of Appeal of Florida, Third District. The judgment of the trial court was affirmed. *Maness v. State*, 262 So.2d 716 (Fla. 3rd D.C.A. 1972). (A. 186).

In that appeal, the petitioner claimed that the trial court had deprived him of the right to offer testimony and present a defense as guaranteed by the due process clause of the Fourteenth Amendment, relying *inter alia* on *Washington v. Texas*, 388 U.S. 14 (1967). The District Court of Appeal rejected this argument and reaffirmed the voucher rule by holding: "An attempt by the defendant to impeach his own witness was properly denied by the court, on objection by the State." *Maness v. State*, 262 So.2d at 717. (A. 187)

C. The Petition for Federal Habeas Corpus Relief

On October 23, 1973, a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Florida. (A. 188, 194) The petitioner claimed that the exclusion of defense evidence by the state trial judge denied the petitioner due process of law and contravened principles enunciated by the Supreme Court of the United States in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

More specifically, the petition for habeas corpus relief alleged a deprivation of the petitioner's fundamental constitutional rights to due process of law because:

1. The petitioner was precluded from cross-examination of Linda Maness, the only other suspect to the crime, regarding her knowledge that Gary Maness was innocent, and prevented the Defendant from showing that Linda Maness' in-court testimony differed greatly from her extra-judicial statements regarding the death of the baby.
2. The petitioner was precluded from impeaching Linda Maness by showing that she had written letters to Gary which contained, *inter alia*, statements to the effect that Gary was innocent and that she was sorry for what she had done to him.
3. The petitioner was precluded from calling Dana Maness who would have testified that Linda Maness had made extra-judicial statements to her to the effect that the Defendant was innocent of the charges against him.
4. The petitioner was precluded from calling Ruth Maness who would have testified that Linda Maness' in-court statement was inconsistent with a prior extra-judicial statement.

The habeas corpus petition averred that:

Defense counsel had asked the Court for permission to treat Linda Maness as an adverse witness so that it could impeach her statement regarding the commission of the offense with which the defendant was charged. Defense counsel was trying to show that Linda Maness and *not* the petitioner had battered the child and caused the child's death. He was precluded from doing so by the trial court's ruling regarding the impeachment of one's own witness. (A. 198)

The district judge made no finding of fact regarding the role of the petitioner's wife in the trial or the nature of her testimony, except that the defense had moved to call her as an adverse or hostile witness and that this motion had been denied. (A. 213) The petition alleged that upon taking the stand, "Linda Maness testified consistently with the State's position..." (A. 195) The respondent confirmed this allegation:

It was Linda Maness' testimony that on the day in question the victim was in good health throughout the day until Mrs. Maness left about 4:00 or 4:15 p.m. When she returned she found the child in the battered condition in which she died... She further stated she did not know how the child was injured. (A. 205)

On December 18, 1973, the district court entered its order of dismissal of the habeas corpus petition. (A. 212) The district court found that the petitioner had adequately exhausted his state remedies, and so decided the case on the merits. (A. 215) It also determined that *Chambers v. Mississippi, supra*, had announced no new principles of constitutional law, and that Florida's assertion that petitioner's claim presented a question regarding the retroactive application of *Chambers* was incorrect. (A. 219)

The district judge held that the evidentiary rulings of the state court "did not have the effect of thwarting any defense theory the petitioner sought to assert." (A. 218) This conclusion was reached notwithstanding the district judge's findings of fact:

Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; *that she knew petitioner had not done it*; that she felt guilty about what she was doing to petitioner; and *that she was not at the store during the afternoon of April 14, 1971*. These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness.

Finally petitioner attempted to present the testimony of his sister-in-law, Dana Maness, regarding admissions made to her by petitioner's wife that *petitioner had not touched the baby*; and that she did not know what had really happened; and *that she had never left her home during the afternoon hours of April 14, 1971*. (A. 213-14) (Emphasis added.)

D. The Appeal From the Denial of Federal Habeas Corpus Relief

On January 9, 1974, petitioner filed a motion for reconsideration or alternatively for a certificate of probable cause and memorandum in support thereof. (A. 219) On January 14, 1974, the district judge entered his order denying the motion for reconsideration and granting a certificate of probable cause to appeal and leave to proceed in forma pauperis.

On January 18, 1974, the petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On appeal, the petitioner argued:

THE DISTRICT COURT ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF ONE'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND DENYING THE PETITIONER DUE PROCESS OF LAW.

The factual parallels between the instant case and *Chambers v. Mississippi*, 410 U.S. 284 (1973), were extensively argued both in petitioner's brief and in oral argument. Petitioner also relied on the ruling of the Ninth Circuit in *United States v. Torres*, 477 F.2d 924 (9th Cir. 1973). *Torres*, relying upon the rule announced by this Court in *Chambers*, reversed a conviction and held that:

[T]he rule against impeaching a party's own witness [is] a pointless limitation on the search for truth. *Id.* at 925.

The Fifth Circuit, in a split decision, rejected petitioner's arguments, notwithstanding the majority's unequivocal findings that:

The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. *Maness v. Wainwright*, 512 F.2d 88, 92 (5th Cir. 1975)

It would certainly have furthered the 'integrity of the fact-finding process' *Chambers, supra* at 925, 93 S.Ct. at 1046, if Maness had been allowed to cross-examine her [Linda]. 512 F.2d at 91.

The majority, in essence, based its affirmance on the following:

a. *Chambers* is applicable, but "we cannot read *Chambers* as broadly as Maness would have us. . . ." 512 F.2d at 91.

b. Although Maness' defense was restricted by operation of the state voucher rule, the applications of the rule did not amount to the degree of interference which would constitute a denial of Maness' right to a fundamentally fair trial. 512 F.2d at 89, 92.

c. Maness' explanation as to how the baby was injured was unrealistic. The opinion finds:

"Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in the head with her bottle." 512 F.2d at 92.

d. With regard to the proffered but excluded testimony of Dana and Ruth Maness (which contradicted Linda's in-court testimony and statements to the police), the court did "not find in a close relative's testimony the 'persuasive assurances of trustworthiness' cited by the Court in *Chambers*. . . ." 512 F.2d at 92.

e. Linda's letters which were excluded by the state trial judge, were not made part of the record and "it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense." 512 F.2d at 91.

In dramatic contrast to the findings in the majority opinion, Judge Clark, dissenting, could perceive no distinction between the proof wrongfully excluded in *Chambers* and that refused in the case at bar. 512 F.2d at 93.

Judge Clark found that the excluded evidence corroborated Maness' repudiation of his confession, that the evidence was excluded as a direct result of the application of Florida's voucher rule, that the exclusion of this evidence violated due process of law, and that, at a minimum, the case should have been remanded for a determination of the authenticity and content of Linda's letters.

On or about May 21, 1975, petitioner filed his petition for rehearing and suggestion for rehearing en banc. (A. 232)

The bases for the petition were arguments that:

1) The majority's narrow interpretation of the holding of *Chambers* was erroneous, especially in light of its finding that *Chambers* was applicable to the case.

2) Even accepting a narrow interpretation of the *Chambers* holding, the state trial judge's repeated exclusions of evidence based on Florida voucher rule interfered with Maness' ability to present his defense to such a degree that his constitutional right to due process of law was violated.

3) The majority's finding that Maness' in-court explanation of how the baby sustained its injuries was improbable, overlooked Maness' testimony that he based this explanation on what "Linda told me . . . [w]hen I asked her how she [the baby] got the bruises." (A. 120. See also A. 103, 105, 115, 118-119). In context, this version of the baby's injury is entirely consistent with the petitioner's version of the events of the day in question and with the thrust of his defense.

4) The majority's repeated references to the fact that Linda's letters were not part of the record on appeal, and, that they therefore could not be evaluated by the court to determine what effect their exclusion would have had on the defense, were irrelevant and improper. The habeas petition contained sworn allegations as to

the letters' contents. The State of Florida did not controvert these averments. The habeas judge, in his order of dismissal of December 18, 1973 (A. 212), made findings as to the nature and contents of Linda's letters, which findings were not attacked by the respondent at any time. Moreover, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Federal Appellate Rule 10(c), which motion contained synopses of the contents of the letters, and to which copies of Linda's most damning letters had been attached.⁴

5) The majority's finding that the excluded testimony of Dana and Ruth Maness lacked the "reliability and trustworthiness" which characterized the "hearsay" improperly excluded in *Chambers* was erroneous and irrelevant. The proffered testimony was intended to impeach Linda's in-court testimony and therefore was not "hearsay" as the majority erroneously concluded. Rather, the impeachment evidence was non-hearsay, in that it was not coming in for its truth. Also, and alternatively, the fact that this evidence cross-corroborates the other excluded evidence and Maness' testimony, rendered its exclusion even more prejudicial.

Petitioner argued that the case involved a matter of exceptional importance, warranting a rehearing en banc. In that regard, the petitioner argued that the *Maness* case was the first enunciation of the Fifth Circuit directly interpreting *Chambers* and that the majority had erred in reaching a result opposite that reached by this Court in *Chambers*. Petitioner also argued that the *Maness* decision was irreconcilable not only with *Chambers*, but with the Ninth Circuit's recent case applying *Chambers*, *United States v. Torres*, 477 F.2d 922 (9th Cir. 1973).

⁴The motion was denied without opinion on June 11, 1975.

As previously mentioned, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Federal Appellate Rule 10(c). Attached to the motion were copies of many of Linda's letters which had been excluded by the state trial judge. The motion pointed out that the majority's numerous references to the unavailability of the letters had been the first time the apparent lack of the letters had been relied upon to deny Maness habeas corpus relief. Moreover, the motion set forth petitioner's repeated efforts to admit the letters at his trial. (See A. 88-92) This motion was denied without opinion by the Fifth Circuit on June 11, 1975.

In response to the petition for rehearing and suggestion of the appropriateness of a rehearing en banc, a majority of the judges of the Fifth Circuit voted in favor of granting a rehearing of the cause en banc on briefs without oral argument. 519 F.2d 1085. (A. 243) In accordance with the order, the parties filed supplemental briefs.

On March 18, 1976, the court entered two orders. The first denied the petition for rehearing. (A. 246) The second vacated the September 2, 1975, order granting rehearing en banc. (A. 244) From the order denying rehearing, Judge Clark dissented: "[T]he majority has misapplied the principles of *Chambers v. Mississippi* to the facts of this bizarre and tragic case." (A. 246) 528 F.2d 1383.

The order denying rehearing en banc was signed by nine circuit judges, five dissented, and one concurred in part.

The five dissenters and Chief Judge Brown, concurring with the dissent, opined that the en banc majority had decided the *Maness* case on the basis of *Chambers*, but had reached the wrong result. The en

banc dissenters observed that the majority failed to present a version of the facts which contradicted the account set forth in Judge Clark's dissent, which dissent was characterized as "unanswerable." 512 F.2d at 1382. The en banc dissenters acknowledged that Maness' defense theory was that there was reason to believe that Linda, rather than the petitioner, was the perpetrator of the crime, and that all evidence excluded tended to corroborate this defense. The dissenters concluded that *Chambers* requires that a defendant be afforded a fair opportunity to defend, that the majority opinion is clearly inconsistent with *Chambers*, and that *Chambers* can only be distinguished "in immaterial factual details." 512 F.2d at 1382.

ARGUMENT

I.

THE COURT BELOW ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF A PARTY'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND VIOLATING THE PETITIONER'S RIGHTS TO A FAIR TRIAL, COMPULSORY PROCESS, CONFRONTATION, AND CROSS-EXAMINATION, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTHTEENTH AMENDMENT.

In the instant case, as in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the issue presented is whether the application of a state "voucher" rule which resulted in the exclusion of testimony and evidence exculpatory of the defendant amounted to a deprivation of the defendant's right to due process of law.

The majority opinion as to which review is sought states:

The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. 512 F.2d at 92.

The majority opinion thus concedes that Gary Maness' defense was adversely affected by the state trial court's exclusion of evidence based on the Florida voucher rule. The opinion goes on, however, to affirm the denial of habeas corpus relief because, in the opinion of the majority, the *degree* of the state trial court's interference with the petitioner's efforts to establish a defense did not violate Maness' right to a fair trial. 512 F.2d at 91-92. In reaching this decision, it is submitted the opinion *sub judice* misinterprets and misapplies the controlling facts and law of *Chambers v. Mississippi*.

In *Chambers*, this Court reversed a state murder conviction. The reversal was based in part on the principle that a state's voucher rule, could not, consistent with due process, be applied so as to interfere with a criminal defendant's fair opportunity to present a defense. In *Chambers*, this Court concluded:

Whatever validity the "voucher" rule may once have enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little relationship to the realities of the criminal process. 410 U.S. at 296.

A. The Majority Opinion *Sub Judice* Overlooks And Misconstrues Controlling Law And Fact In Reaching The Conclusion That *Chambers* Is Materially Distinguishable From The Instant Case And That The Application Of The Voucher Rule Did Not Deprive The Petitioner Of A Fundamentally Fair Trial.

1. The factual parallels between *Chambers* and *Maness* are striking.

Chambers was charged with killing a police officer. One Gable McDonald had been present at the scene of the crime. McDonald made a number of extrajudicial admissions that he had committed the crime, but repudiated them at Chambers' preliminary hearing.

At his trial, Chambers attempted to develop two grounds of defense: 1) that he did not commit the crime, and 2) that Gable McDonald did. Chambers was partially successful in bringing evidence in support of this defense before the jury, but his efforts were thwarted by the strict application of certain state evidentiary rules.

Chambers requested that he be allowed to call McDonald as an adverse witness if the State failed to call McDonald to the stand. The trial court permitted Chambers to call McDonald, but not as an adverse witness. McDonald's written confession was admitted into evidence. The State, on cross-examination, elicited from McDonald that he had repudiated his prior admissions. The defense then sought to cross-examine McDonald *as to the repudiation*. The trial court applied Mississippi's voucher rule to preclude this cross-examination. The scope of Chambers' direct examination of McDonald was also restricted by the voucher rule's corollary that the party calling a witness is bound by anything the witness might say.

Thwarted in his attempt to directly challenge McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of witnesses to whom McDonald had admitted his complicity. The State objected on hearsay grounds, and the trial court sustained the objection.

This Court analyzed Chamber's predicament:

As a consequence of the combination of Mississippi's "party witness" or "voucher" rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. 410 U.S. at 294.

After noting that Chambers had been relegated to chipping away at the fringes of McDonald's story, the Court observed:

Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted. 410 U.S. at 294.

The parallels between *Chambers* and the instant case are striking. The Mississippi common law voucher rule, which was declared unconstitutional as applied in *Chambers* is identical to the Florida voucher rule which was applied against the petitioner.⁵ Other significant

⁵ Florida's "voucher rule" is embodied in *Fla. Stat.* §90.09. In *Johnson v. State*, 178 So.2d 724, 728 (Fla. 2nd D.C.A. 1965), the court held that *Fla. Stat.* §90.09 was "little more than declaratory of the rule as it existed before. . . . [T]he statute was identical with the majority *American common law* rule [regarding the impeachment of a party's own witness]."

In *Chambers*, the Mississippi common law voucher rule was said to rest on the presumption—with regard to the circumstances of the particular case—that a party who calls a witness vouches for his credibility. This Court traced the origins of the voucher

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parallels are the role of Linda Maness to that of Gable McDonald, and the inability of the defendant in each case to bring the relevant facts before the jury due to the application of state evidentiary rules.

Linda Maness had been present at the scene of the offense at or about the time of the crime. (A. 97, 101, 213) She was the only other possible suspect, and Maness' trial counsel, in his opening statement to the jury, simply stated that Gary had not committed the crime, and that the defense would show who did. (A. 25, *see n. 1 supra* and accompanying text.) Linda had made a number of extra-judicial statements which were against her penal interest with regard to the offense, and which exculpated the petitioner. (A. 88-92, 123-124)

Linda Maness was not called as a witness by the state. At the close of the state's case, the petitioner called her to the stand.

Defense counsel repeatedly requested that he be allowed to treat Linda Maness as an adverse witness. The court repeatedly denied these requests. (A. 85, 86, 90, 91, 92)

(footnote continued from preceding page)

rule to a "primitive English trial practice in which 'oath-takers' or 'compurgators' were called to stand behind a particular party's position in any controversy." 410 U.S. at 296. The Florida court of appeals in *Johnson v. State, supra*, at 727, traced the origins of *Fla. Stat.* §90.09 to the same source:

The rule that one may not impeach his own witness has its most likely origin in trial by compurgation, or wager of law, in which the defendant or person accused was to make oath of his own innocence and to produce a certain number of compurgators, to swear that they believed his oath. III Blackstone 342. It is logical enough to say that the party avouches for or guarantees the credibility of his 'oath helpers'.

The defense then asked Linda whether she had killed her baby or ever struck it. She answered in the negative. (A. 85).

Defense counsel attempted to cross-examine Linda Maness. He was interrupted in the middle of his question: "Isn't it a fact that you know that your husband, Gary Maness did not—", by the state's objection based on Florida's voucher rule. The trial court sustained the objection. (A. 85-86)

Thwarted in his attempt to directly challenge Linda Maness' testimony from the witness stand, the petitioner made an effort to impeach her indirectly. This effort was accurately described by the federal habeas judge:

Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness. (A. 213-214)

Thus the state trial judge repeatedly applied Florida's voucher rule to exclude evidence which the petitioner was attempting to bring before the jury. The petitioner was placed in a worse predicament than that in which Chambers had been. The petitioner was precluded from chipping away at Linda Maness' testimony; he was absolutely unable to cross-examine her or present other witnesses who would have discredited her testimony. The state trial judge abridged the petitioner's federally protected rights and rendered his defense "far less persuasive" than it otherwise would have been. *Chambers*, 410 U.S. at 294.

Thus, as in *Chambers*, the thrust of the petitioner's defense is that someone other than the petitioner is guilty of the offense. In *Chambers*, the defendant was permitted to call one Gable McDonald when the State failed to do so in the State's case in chief. When McDonald was on the stand his *written confession* was admitted into evidence. On cross-examination by the State, McDonald repudiated the confession on the grounds that it was part of a scheme to free Chambers so that a false arrest suit could be brought and McDonald could participate in the proceeds. After McDonald's repudiation, the defense attempted to cross-examine him *as to his repudiation*. Thus, in *Chambers*, the defense was permitted to introduce into evidence the written extra-judicial statement by the witness (something not permitted in the case at bar), and was thwarted only in the cross-examination of the witness as to his repudiation of that extra-judicial statement.

In contrast, in *Maness*, Linda's letters were *not* permitted into evidence, notwithstanding the defense's repeated efforts to have the letters admitted. (A. 88-92) Thus, the instant opinion's judgment that "*Chambers*' trial was a palpable miscarriage of justice," (512 F.2d at 91) but that here "the Voucher Rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause" (512 F.2d at 92) is patently erroneous.

The defense was permitted to go much further in *Chambers* than the defense in *Maness* was permitted to go, yet this Court reversed Chambers' conviction because of the application of the voucher rule in precluding the cross-examination of McDonald as to his repudiation of the confession. Petitioner was not even permitted to introduce into evidence Linda's letters, nor was he permitted to cross-examine her as to the

contents of those letters. The written confession of McDonald in *Chambers*, is parallel to Linda's letters in *Maness*.⁶ The confession in *Chambers* was introduced into evidence; the letters in *Maness* were not. That and that alone is sufficient to establish that the instant case manifests a greater deprivation of constitutional rights than that which was present in *Chambers*. The opinion *sub judice* suggests that the deprivation in the *Maness* case was of a lesser degree than that in *Chambers*. This conclusion could only have resulted from a misapplication of the controlling facts of the *Chambers* decision.

2. In attempting to fashion distinctions between *Chambers* and *Maness*, the majority opinion misconstrues and overlooks controlling facts and law.

In attempting to fashion distinctions between *Chambers* and *Maness*, the majority opinion of the Fifth Circuit misconstrues and overlooks controlling facts and law. Such errors occur in at least three significant areas: the mischaracterization of Dana and Ruth Maness' proffered testimony as "hearsay" lacking the necessary indicia of trustworthiness; the findings concerning Gary's version of the baby's death; and the effect of Linda's letters not having been included in the record on appeal.

As to the first point, throughout the instant opinion, the majority characterizes the proffered testimony of Dana and Ruth Maness as "hearsay testimony" which lacks the reliability and trustworthiness common to the hearsay testimony improperly excluded in *Chambers*.

⁶ These letters tend to exculpate petitioner and support his defense. To the extent they exculpate Gary, they inculpate Linda, as it is undisputed that she is the only other suspect.

This characterization is inaccurate. This testimony was sought to be introduced for the purpose of impeaching Linda Maness' in-court testimony. Thus, it is not hearsay at all, but rather non-hearsay, in that it was not coming in for its truth, and would have been acceptable as impeachment evidence had it not been excluded on the basis of the Florida voucher rule. *Tomlinson v. Peninsular Naval Stores Co.*, 61 Fla. 453, 55 So. 548 (1911); *Wallace v. Rashkow*, 270 So.2d 743 (Fla. 3rd D.C.A. 1972); cf. Rule 801(d)(1), *Federal Rules of Evidence*. Significantly, the record before the Fifth Circuit clearly reflected that the state trial judge had excluded Dana and Ruth's proffered testimony, not on hearsay grounds, but on the basis of Florida's voucher rule.⁷ Thus, the majority opinion's characterization of

⁷MR. MINKUS: She is going to state that there was a conversation in an automobile in Tennessee where they were burying the baby and there was also another girl present, the sister of the defendant, who was not able to be here because she is having a baby, where she said—where Linda Maness said—that Gary did not touch the baby; that she did not know what happened and that she never left her home to go to the store and leave the baby alone during the date of April 14, 1971.

McWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained.

MR. MINKUS: Well then, there was another conversation on April 23, wherein Linda Maness made the statement to the effect that Gary didn't do it.

MR. McWILLIAMS: Same objection.

THE COURT: Sustained.

* * *

MR. MINKUS: Mrs. Ruth Maness, the mother of the defendant. She came to the home of the accused during the week of April 14 to the 22nd, or until the 18th, while the baby was lying in the hospital; that there were found some bloody baby blankets, and that Linda Maness was asked, "How did this blood get on these?" And she said that they got on the blanket because she had her period.

MR. McWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained. It will be sustained. (A. 123-124)

Dana and Ruth's testimony as "hearsay" is fallacious.⁸

The majority's finding as to the defense's version of the manner in which the baby sustained its injuries is also fallacious. The majority improperly attributes the following implausible explanation to the petitioner:

Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in her head with her bottle. 512 F.2d at 92.

While it is true that Gary Maness did testify to that effect, the record before the Fifth Circuit clearly reflected that the source of that explanation was the petitioner's wife. The court, however, ignored the fact that the petitioner later testified that this was his belief *only because this is what his wife had told him*:

Q. Now, when you say that you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said "that's as far as I know," how do you know that's how it happened?

A. Because Linda told me.

Q. When did she tell you that?

A. When I asked her how she [the baby] got the bruises. (A. 120; see also A. 118-119, 115, 103, 105)

⁸Even assuming *arguendo* that the excluded evidence could properly be characterized as hearsay, the evidence was sufficiently reliable and trustworthy to warrant its presentation to the jury. Each of the items excluded corroborates the others, as well as the petitioner's in-court testimony in support of his defense. Equally important, Linda, Dana, and Ruth were all present in court and subject to full examination by both parties concerning the statements in question. See *Chambers, supra* at 301. Thus, the evidence should have been admitted, and its credibility left for the jury to weigh.

Thus, Gary Maness' explanation of how the baby sustained these injuries is entirely consistent with the thrust of his defense, that he was innocent and there was reason to believe his wife lied. Linda's letters, which the defense attempted to introduce into evidence, corroborate this defense position. The proffered testimony of Dana Maness also corroborates this view, as does that of Ruth Maness.

The petitioner's defense was also predicated upon the establishment of a reasonable doubt as to Gary's guilt in light of Linda's letters. The majority opinion states:

Unfortunately, these letters are not part of the record on appeal and it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense. 512 F.2d at 91.

The majority repeatedly pointed out that Linda's letters were not before them and therefore could not be examined as part of whether their preclusion significantly affected Maness' defense. 512 F.2d at 89, 91, 92. However, sworn allegations as to the content of the letters were made in the habeas corpus petition. These statements were *not* controverted by the response of the Attorney General of the State of Florida in the district court. Moreover, the district court made specific findings as to the content of the letters. (A. 213-214) Because the habeas judge made findings as to the nature and content of Linda's letters, which findings were supported by the record, it was highly improper for the Fifth Circuit to deny petitioner relief predicated upon the perceived unavailability of the letters. See *Walker v. Johnston*, 312 U.S. 275, 284 (1941).

It is submitted that the dissenting opinion of Judge Clark in the instant case suggests the constitutionally correct disposition of petitioner's claim:

The missing letters from wife Linda, according to our only information as to their content, not only supported Dana's statements, but also substantiated the theory of Gary's defense. Misty received fatal wounds while she was in the custody of Gary or Linda, or both of them. Gary's confession assumes sole responsibility, subject to the impossible possibility of self injury. Linda's letters and Dana's statements tended to cast more than a reasonable doubt that Gary alone was guilty. The letters and testimony were excluded solely because of the Florida Voucher Rule which sanctified Linda's testimony from attack by Gary.

As I perceive the due process principle announced in *Chambers*, it commands that every material source of evidence as to what was said and done by the principal players in this domestic tragedy should be laid before the triers of fact. 512 F.2d at 93.

3. Contrary to the conclusion of the court below, the repeated applications of the voucher rule in the instant case deprived the petitioner of his due process right to present a defense.

In addition to misapplying *Chambers'* facts, the Fifth Circuit has misinterpreted and misapplied *Chambers'* rule of law. The court below conceded:

The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. 512 F.2d at 92.

The court, however, concluded that, under all the facts and circumstances, the application of the voucher rule had not made the petitioner's defense less persuasive to such a degree that his right to a fair trial was violated. 512 F.2d at 91, 92.

Given the numerous, significant mistakes of fact and law reflected in the Fifth Circuit's opinion, its conclusion must be approached with circumspection. It is submitted that, under the actual facts and circumstances reflected in the record before the Fifth Circuit, the only proper conclusion is that the petitioner's trial did not meet the "fundamental fairness" test.

The factors to be considered in determining whether the proceedings *sub judice* were fundamentally fair are: 1) the validity and value of the particular evidentiary rule in question, and 2) the impact of the application of the rule on the petitioner's right to present a defense. See *Chambers* at 295. An analysis of each of these factors compels the conclusion that the petitioner was deprived of a fair trial. It was fundamentally unfair for the Florida trial court to exclude evidence which suggested the petitioner's innocence by applying a state evidentiary rule which serves no legitimate state interest whatsoever.

With regard to the validity or value of the voucher rule, the court below noted that the common law voucher rule had been the subject of criticism by the federal judiciary and that its demise in the federal courts was at hand. 512 F.2d at 92. See also Rule 607, *Uniform Rules of Evidence*. This Court has made two observations with regard to the voucher rule which are significant in this context: 1) the rule "bears little present relationship to the realities of the criminal process"; and 2) "[I]n modern criminal trials defendants are rarely able to select their witnesses: they must take them where they find them." *Chambers*, 410 U.S. at 296. See also *Brooks v. Tennessee*, 406 U.S. 605, n. 2 (1972). The Ninth Circuit has characterized the voucher rule as a "pointless limitation on the search for truth." *United States v. Torres, supra* at 295. The Second Circuit has termed the rule pernicious and irrational:

We do not limit our repudiation of the pernicious rule against impeachment of one's witness to instances in which the witness is an "adverse party" or "hostile." The search for truth is not to be confined by any such limitation, and, as Professor Morgan has aptly said:

"The fact is that the general prohibition, if it ever had any basis in reason, has no place in any rational system of investigation in modern society and all attempts to modify or qualify it so as to reach sensible results serves only to demonstrate its irrationality and to increase the uncertainties of litigation." I Morgan, *Basic Problems of Evidence*, page 64 (1954 Ed.) *United States v. Freeman*, 302 F.2d 347, 351 (2d Cir. 1962).

The impact that the evidentiary rule had on the petitioner's right to present a defense makes fundamental unfairness manifest in that the rule rendered the petitioner's defense substantially less persuasive than it would otherwise have been. The voucher rule was repeatedly applied to sanctify the testimony of a witness who was the only other suspect to the crime, which testimony was consistent with the prosecution theory of the case. It was crucial to the petitioner's defense to show that his wife's testimony was false, and that she had reason to lie. If the state trial court had permitted Gary to introduce Linda's extra-judicial oral and written statements, the jury might very well have disbelieved Linda's testimony and determined that there was a reasonable doubt as to Gary's guilt.

Balancing all of the facts and circumstances reflected in the record before the court below, its conclusion that the trial proceedings were fundamentally fair is obviously erroneous. A rule which has been properly characterized as irrational, pernicious, unrealistic, and

pointless cannot, consistent with "fundamental fairness," be permitted to exclude evidence of substantial value to the defense.

4. The unduly strict interpretation of the rationale of *Chambers* accepted by the majority opinion *sub judice* is inconsistent with the interpretation of *Chambers* made by the Ninth Circuit and the courts of numerous states.

The position taken by the Fifth Circuit in the instant case is inconsistent with the interpretation of *Chambers* adopted by the Ninth Circuit and by the courts of numerous states.

In *United States v. Torres*, 477 F.2d 922 (9th Cir. 1973), the Ninth Circuit applied the *Chambers* rule and reversed a conviction where the trial judge had precluded the defense from impeaching its own witness. Torres, who had been charged with importing and possessing cocaine and heroin, called as a defense witness one Anselmo Lebron, the man who had been in the back seat of Torres' car at the time Torres was apprehended. Torres had testified that his jacket, in which the drugs were found, had been in the back seat of the car adjacent to Lebron. Lebron's testimony at trial was that Torres had worn the jacket during the entire trip. Torres then attempted to impeach Lebron's testimony by introducing Lebron's prior conviction for selling heroin. The trial judge refused to permit Torres to do this on the grounds that, absent surprise, one may not impeach his own witness. The Ninth Circuit, citing *Chambers*, reversed the conviction and held:

It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie. It was in Lebron's interest to lie to

save himself from prosecution and from revocation of his probation for the prior conviction. If the court had permitted Torres to introduce Lebron's record, the jury may have disbelieved Lebron's testimony and acquitted Torres.

* * *

[T]he rule against impeaching a party's own witness [is] a pointless limitation on the search for truth. *Id.* at 923.

There is a distinct parallel between the *Torres* rationale and the instant petitioner's position. Here, as in *Torres*, the petitioner attempted to impeach a witness who was a possible suspect in the offense in question. Both defendants attempted to show that the witness' testimony, which was consistent with the prosecution's theory of the case, was false and that the witness had reason to lie in order to avoid prosecution.

The *Torres* court concluded its opinion by observing that this Court in *Chambers* had "reversed a state conviction in which a defendant was not permitted to impeach his own witness." *Torres, supra*, at 924. It is submitted that under *Chambers*, a result equivalent to that reached in *Torres* is required in the instant case. See *Davis v. Alaska*, 415 U.S. 308 (1974).

In addition to the Ninth Circuit, numerous state courts have applied the rule of law of *Chambers* in various contexts. In each instance, the common denominator was the promotion of the fundamental right to present a defense.

In a case involving a direct clash between the voucher rule and the right to present a defense, the Supreme Court of North Dakota applied *Chambers* and *Davis v. Alaska* and declared that the voucher rule should be abandoned completely. *State v. Hilling*, 219 N.W.2d 164, 172 (N.D. 1974).

Various states have permitted the prosecution to cross-examine and impeach its own witnesses, state

voucher rules to the contrary notwithstanding. In *State v. Lewis*, 523 P.2d 1316 (Ariz. 1974), the Supreme Court of Arizona affirmed a murder conviction and held that the prosecution had the right not only to cross-examine its own witness, but to impeach its own witness by prior inconsistent statements. The court stated:

We agree with the recent statement of the United States Supreme Court that 'whatever validity the 'voucher' rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process.' [citation omitted]. *Id.* at 1318.

In *Gray v. State*, 525 P.2d 524, 525-26 (Alaska 1974), the prosecution was also permitted to impeach its own witness by prior inconsistent statements.⁹

Both *Lewis* and *Gray* reach results consistent with this Court's opinion in *Chambers*. It is submitted that if, under *Chambers*, the prosecution can impeach its own witnesses, *a fortiori* the defense must also be permitted to do so. This is especially true where, as here, the attempted impeachment concerns a matter crucial to the defense theory of the case.

Chambers has been applied by a number of state courts to promote the right to present a defense, separate and apart from the area of impeachment, even where the evidence sought by the defendant was otherwise privileged. The Supreme Courts of New Jersey and North Carolina have each applied *Chambers*

⁹In *Patterson v. State*, 321 A.2d 554 (Md. 1974), the court, upon motion by the state, called a witness as the court's own, for the express purpose of permitting the state to circumvent the voucher rule's prohibition against a party impeaching its own witness.

and reversed convictions where the defense was improperly prevented from obtaining evidence which, although exculpatory of the defendant, was protected by the Fifth Amendment.¹⁰

In *State v. Jamison*, 316 A.2d 439 (N.J. 1974), an accomplice, during a recess in the defendant's jury trial, insisted upon confessing that he, rather than the defendant, had committed the crimes with which the defendant had been charged. The accomplice had previously been thoroughly advised of his rights. Nevertheless, the trial court, *sua sponte*, assigned counsel for the accomplice in order to further advise him of his privilege against self-incrimination. After receiving the advice of court appointed counsel, the accomplice

¹⁰See also Justice Holohan's specially concurring opinion in *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976), wherein he analyzes the clash between the values represented by the attorney-client privilege on the one hand, and the right to present a defense on the other:

It is basic that an accused has the right to present a defense to a criminal charge, and, to accomplish this right, the accused has the right to compel the attendance of witnesses and the right to present their testimony. *Washington vs. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967). Even a claim of privilege may have to give when faced with the necessity by the accused to present a defense. *Roviaro vs. United States*, 353 U.S. 53. . . .

The problem of balancing competing interests, privilege versus a proper defense, is a difficult one, but the balance always weighs in favor of achieving a fair determination of the cause.

A state's rules of evidence cannot deny an accused's right to present a proper defense. *Chambers v. Mississippi*, *supra*. In the case at issue, the interest to be protected by the privilege would seem to be at an end because of the client's death. I believe that the constitutional right of the accused to present a defense should prevail over the property interest of a deceased client in keeping his disclosures private. *Id.* at 1088.

retracted his confession. In reversing the defendant's conviction, the Supreme Court of New Jersey stated:

A confession by another is of such probative importance in a criminal trial that its exclusion, or the unreasonable impairment of an attack on its repudiation, although sanctioned by local evidence rules, has been held a denial of the defendant's due-process right to a fair trial. *Chambers v. Mississippi* [citation omitted]. We are of the firm opinion that the diversion by this aspect of the proceedings below of the prospective testimony in the defendant's favor, taken together with the other matters mentioned elsewhere herein, visited such harm upon the defendant's case as warrants reversal. *Id.* at 447.

In *State v. Alford*, 222 S.E.2d 222 (N.C. 1976), the court reversed a defendant's conviction for murder based on the trial court's denial of the defendant's motion for a severance of his trial from that of his co-defendant, Carter. Carter had confessed to the crime, but in his written confession had exculpated the defendant, Alford, by claiming that another individual, Waddell, was the co-perpetrator of the robbery and murders with him. Carter declined to take the stand and the state did not introduce his written confession. The court observed that although Alford could have called Carter as a defense witness, Carter could have refused to testify relying on his rights under the Fifth Amendment. Thus, the court observed that Alford was effectively deprived of evidence which would have corroborated his alibi testimony. In reversing Alford's conviction, the court cited *Chambers*, and held that because his alibi defense was rendered "less persuasive" than it would have been had Carter's statement been introduced, the denial of Alford's motion for severance constituted reversible error.

In that the rule of law of *Chambers* supercedes legitimate interests, in the instant case it should certainly supercede the questionable interests represented by Florida's voucher rule. Of course, neither the federal nor the state cases cited hereinabove are binding upon this Court, but the legal principles reflected therein are consistent with this Court's holding in *Chambers* and should be persuasive.

B. The Voucher Rule as Applied In The Instant Case Not Only Violates The Fundamental Fairness Standard Of The Due Process Clause Of The Fourteenth Amendment But Also Violates The Petitioner's Sixth Amendment Rights To Compulsory Process And Confrontation Made Applicable To The States Through The Due Process Clause.

The reversal of Chamber's conviction was predicated upon the conclusion that under the facts and circumstances of that case, the rulings of the trial court had denied Chambers "a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302. However, it is submitted that application of a state voucher rule in a criminal case may deprive a defendant of his Sixth Amendment rights to compulsory process and confrontation, as applied to the states through the due process clause, without necessarily reaching the *degree* of interference required to support a finding of a deprivation of "fundamental fairness" under the Fourteenth Amendment.¹¹

¹¹The distinction between the degree of error necessary for a denial of "fair trial" on Fourteenth Amendment due process grounds, and the broader range of the various provisions of the Sixth Amendment as applied to the states through the Fourteenth Amendment due process clause, was recognized by the court below in *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. en banc 1975).

This Court observed in *Chambers*:

The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' 410 U.S. at 295.

The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. 410 U.S. at 294.¹²

However,

[T]he right to confront and cross-examine is not absolute and may, in appropriate cases bow to accommodate other *legitimate* interests in the criminal trial process. . . . *But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.* 410 U.S. at 295. (emphasis added)

In the instant case "the competing interest" is Florida's voucher rule. The rule has been described as "pernicious," "archaic," "irrational," and "potentially destructive of the truth gathering process."¹³ Wigmore

¹²In *Chambers* the Court made it clear that:

The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." 410 U.S. at 297-298.

¹³*Chambers, supra* at 1046 n. 8. Indeed, the court below conceded that the integrity of the fact-finding process would certainly have been furthered if the petitioner had been allowed to cross-examine his wife. 512 F.2d at 91.

calls it "a primitive notion, resting on no reason whatever, but upon mere tradition." See *State v. Hilling, supra* at 171-172.

Thus, the voucher rule cannot be said to promote a "legitimate" state interest which may permissibly "compete" with a defendant's Sixth Amendment rights to confront and cross-examine and to which those rights must sometimes "bow." See *Chambers, supra* at 295. It is submitted that the only constitutionally sound rule would prohibit the application of a state voucher rule in *any* instance where the defendant attempts to compel, cross-examine or confront any witness in order to develop his theory of the case. Cf. *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972). Simply stated, if the sought cross-examination is otherwise relevant and material to the defense theory of the case, the voucher rule should not be permitted to frustrate the defendant's realization of those Sixth Amendment rights.

There is an abundance of authority, both prior and subsequent to *Chambers*, supporting the proposition that the rights to compulsory process, to present witnesses on one's own behalf, and to confront and cross-examine are constitutionally guaranteed to a defendant in a state criminal trial.¹⁴ *Davis v. Alaska*, 415 U.S. 308 (1974); *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Braswell v. Wainwright, supra*; see generally the cases collected in P. Westen, "The Compulsory Process Clause," 73 *Mich. L. Rev.* 71 (1975), and "Compulsory Process II," 74 *Mich. L. Rev.* 191 (1975).

¹⁴These rights have also been broadly recognized as fundamental aspects of the due process right to be heard in a meaningful manner in civil proceedings. See *Goldberg v. Kelly*, 397 U.S. 254 (1970), and the cases cited therein.

In *Washington v. Texas*, *supra*, the Court held that the right to compulsory process had been denied because a Texas statute arbitrarily deprived the petitioner of the right to put on the stand a witness who was capable of testifying, and whose testimony would have been relevant and material to the defense.¹⁵ The Court observed:

Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. 388 U.S. at 19.

The Court concluded that the right to use a witness' testimony is implicit in the right to summon him. Clearly, the petitioner was denied these rights in the instant case.

The Fifth Circuit, applying the rule of *Washington v. Texas*, has held that when the application of a state procedural rule conflicts with a criminal defendant's Sixth Amendment right to compulsory process in obtaining witnesses, the state rule must yield. *Braswell v. Wainwright*, *supra* at 1154.

In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court reiterated that "the right of cross-examination is 'one of the safeguards essential to a fair trial,'" and observed:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial

¹⁵The Court explicitly excluded from the purview of its opinion "nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them" *Washington v. Texas*, *supra* at 23 n. 21.

of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.

Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. [citing *In re Oliver*, 33 U.S. 257, 273 (1948)], *Id.* at 404-405.

See also *Chambers v. Mississippi*, *supra*; *Barber v. Page*, 390 U.S. 719 (1968); *Phillips v. Neil*, 452 F.2d 337 (6th Cir. 1971).

In *Davis v. Alaska*, *supra*, this Court concluded that a state criminal defendant had been denied adequate cross-examination and reversed his conviction. The state trial judge had entered a protective order, based upon the state's interest in protecting the confidentiality of a witness' juvenile record, precluding defense counsel from cross-examining the witness (Green) regarding his record. The defense had opposed the entry of the order so that the defendant could attempt to show that at the same time Green was assisting the police in identifying the defendant; the witness was on probation for robbery. It was Davis' position that Green acted out of fear or concern of possible jeopardy to his probation. Green might have made a hasty and faulty identification of the defendant to shift suspicion away from himself, or might have been subject to undue police pressure and made the identification due to fear of possible probation revocation.

At trial, defense counsel sought to inquire into Green's state of mind at the time that he made the pretrial identification of the defendant. In response to defense counsel's questioning, Green denied any particular concern regarding the incident. The truthfulness of certain of his answers was problematical.

The Alaska Supreme Court affirmed Davis' conviction. This Court, in reversing, observed that: "It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination." *Davis*, 415 U.S. at 314. The Court declared:

Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418. . . . (1965). *Davis*, 415 U.S. at 315.

The Court rejected the Alaska Supreme Court's conclusion that the defense was afforded adequate cross-examination as to bias, relying heavily on the principle that the jurors were entitled to be aware of the possibility of bias so that they could make an informed judgment as to the weight to place on Green's testimony. The Court then analyzed the circumstances which required this conclusion:

While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lack that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. *Davis*, 415 U.S. at 318.

Accord United States v. Torres, supra.

The circumstances which obtain in the case at bar are at least as compelling as those in *Davis* or *Torres*. When Linda Maness took the stand and testified adversely to the petitioner, her possible interest in the petitioner's conviction was far greater than that of the adverse witnesses in those cases. The only suspects in this battered child case were the victim's parents, the petitioner and Linda Maness. The state had not called Linda Maness as a witness. If the petitioner was not guilty of the offense, Linda Maness was the only remaining suspect and was subject to prosecution by the state. Yet Linda Maness was permitted to testify without fear of contradiction that she had left the petitioner alone with a healthy baby, that she returned to find the baby comatose, that the petitioner was not happy with their marriage, and that the petitioner had previously struck the child. The defense was precluded from inquiring whether the witness had filed for divorce from the petitioner, or inquiring into any denial of complicity or bias on the part of Linda Maness. (A. 92-93, 97)

In the instant case the only basis for the trial court's repeated exclusion of evidence exculpatory of the defendant was Florida's voucher rule. In *Chambers*, a combination of the voucher rule and the hearsay rule were deemed insufficient to outweigh the defendant's right to present a defense. *A fortiori*, in *Maness*, Florida's voucher rule standing alone can not be deemed sufficient to warrant infringement upon the petitioner's rights to compel, cross-examine, and confront, and thereby present a defense.

In the instant case, petitioner's entire defense was that he was innocent and his wife, Linda, the only other suspect, was guilty. (A. 25) His efforts to establish his innocence and her guilt by cross-examining and impeaching her were thwarted by application of

Florida's voucher rule. Without regard to whether the degree of interference would be sufficient to amount to a "fair trial" deprivation, it is submitted that the petitioner's Sixth Amendment rights were violated when petitioner was precluded from confronting and cross-examining Linda. This alone should be sufficient to mandate a reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

/s/Bennett H. Brummer
BENNETT H. BRUMMER

Public Defender
Eleventh Judicial Circuit
800 Metro Justice Building
1351 N.W. 12 Street
Miami, Florida 33125
Phone: 305/547-4922

/s/Albert G. Caruana
ALBERT G. CARUANA

Cooperating Attorney
American Civil Liberties Union
Miami Chapter
c/o Greenberg, Traurig, Hoffman,
Lipoff, Quentel & Wright, P.A.
1401 Brickell Avenue
Miami, Florida 33131
Phone: 305/377-2501

Counsel for Petitioner